

A BRIEF OVERVIEW OF ETHICS ISSUES
IN WORKER'S COMPENSATION PRACTICE

This paper constitutes a brief overview of the ethics issues that have confronted worker's compensation practitioners over the years (hence the above title).

In worker's compensation practice, the possibility of dealing with disappointed "customers" of the system seems (to this observer) to be a bit higher than the other forms of personal injury practice. A number of explanations are possible; two that come to mind are: the higher incidence of unrepresented persons in our litigative system, and the "betrayal" factor of worker's compensation ("I gave my all for that employer, and this is how they treat me.").

With that in mind, a careful attention to such concerns as expressed below increases the likelihood of a successful closure of a matter, without recriminations later from an unhappy client or opponent.

I. COMMUNICATION, COMMUNICATION, COMMUNICATION.

Busy practices abound in Worker's Compensation, especially with the limitation on attorney fees to 20% for applicant's attorneys and the various pressures for respondent's attorneys to keep fees down.

Occasionally, communication with the clients suffers.

SCR 20:1.4 provides in part that "a lawyer shall keep a client *reasonably informed* about the status of a matter and promptly comply with reasonable requests for information."

Some examples of this not occurring:

1. Failure to notify a client (injured worker or employer/employer representative) that the case has settled. This isn't so bad as long as the worker/employer aren't *too* disappointed about having made an unnecessary trip to the hearing site, and if the employer/worker *did agree to settle* the case for what ultimately was the settlement amount.

When this isn't true, it can be more than a bad business decision (that is, more might occur than just losing this client). A client sufficiently ticked off could complain. Avoidance of that by keeping good client contact (and in the case of respondents, contacting the employer to make sure if they are going to the hearing, so as to know to call them off, too) is a good thing.

Though not necessarily an ethics issue, it is also good practice to call the witnesses you subpoenaed and tell them the case has settled.

2. Failure to make and maintain regular contact, even with the problem clients (usually the workers, for this section), leads to dissatisfaction and the potential for complaint.

We (at the division) hear rather regularly from workers who want to know the "status" of their cases, and then inform us that their attorney "isn't doing anything, doesn't return my phone calls" etc., etc. I direct these folks to contact their attorneys and make appointments to see them and get all their questions answered.

It is best if it doesn't get that far. I once heard an attorney tell me that they wish they could return all their phone calls within 24 hours. With all due respect, failing to promptly call back or meet clients is asking for complaints.

Besides, these people need answers to their questions and their anxiety is often due to lack of knowledge as to what is going on as anything (although just simply not getting what they want, and being impatient about it, is a good solid reason, too).

As such, I would recommend that you (or your paralegal, if properly trained) should talk to workers as they call, or call them back before the end of the day. At some point, the client should be encouraged to come in and talk about their case. A client who asks for the lawyer should get to talk to the lawyer.

Carbon copies of all letters going out would be good, too.

3. Some other items that clients need to be informed about, as directly as possible:

a. How good or bad their case is, and why. Failure to be direct can lead to substantial disappointment (and complaint) later on. For respondents, failure to tell them they have no defense (it happens that some come to hearing without one) can lead to bad faith and delayed payment problems.

Not to mention, forthright detailing what is wrong with the case or defense can lead to further information given by the client that will help the claim or defense.

b. For applicants, about how long it will take to get a hearing, and what delays there are (and why) in terms of getting on for hearing. This may disappoint them early on, but it will help reduce the anxiety that may later lead to complaint.

c. A calculation of the claim or exposure should be communicated to the client as soon as one can be made. Especially for applicants, unrealism in this aspect of the case can lead to disappointment and anger. Some of our “customers” don’t understand how restricted payments are in worker’s compensation matters, or else they are listening to

their “buddies on the bar stool” tell them about how their cousin got a hangnail at work and some lawyer got them \$250,000 (or some other similarly ridiculous story).

Realism at this as early on in the process as possible will increase the likelihood of satisfactory settlement later, and reduce the likelihood of complaint.

4. For communications sake, if nothing else, start settlement discussions before coming to the hearing site.

Waiting until the day of hearing to start settlement discussions adds (and often unnecessarily) to the anxiety and stress of the clients. They will hear less of what you have to say, will likely be more emotional about it, and will therefore feel more rushed and “forced” into settlement than is best.

The settlement will still likely stand if challenged later, but the inevitable “buyer’s remorse” that sets in will be lessened in effect if the worker/employer is given more time than we can at the hearing to digest what is said and come to an appropriate conclusion.

Most people who litigate cases think they are right to begin with; else, why would they sue or defend if they didn’t? However, the ability to communicate as early on as possible, with as much time to deliberate as possible, regarding the settlement will make it more likely that the ultimate disappointment of “giving in” to a settlement is lessened.

SCR 20:1.4 (b) provides that “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Waiting until the last minute to start settlement discussions may impede the lawyer’s ability to comply with this requirement, and this would give a disappointed worker something else to complain about if they wished to.

II. PROMPTNESS.

Briefly, this repeats some of the above analysis.

SCR 20:1.3 provides that “A lawyer shall act with reasonable diligence and promptness in representing a client.”

According to the comment, this is the anti-procrastination rule. Procrastinating in evidence gathering can lead to the drying up of evidence or the inability to timely get some evidence that can prove detrimental to one’s client. The most common of these for workers is the inability to get all of the medical bills (especially *itemized* bills), and the most common for the respondents side are the late IMEs which don’t get accomplished.

And, this doesn’t even take into account the 15 day rule, Wis. Stats. Sec. 102.17 (1) (d) and sub (8).

One can no longer expect, at least in the current political climate, to be bailed out by an ALJ at hearing on problems with late evidence (and, by and large, don’t expect a postponement out of it either). If the opponent doesn’t object, the ALJ likely won’t care, but that is something you want to work out in *advance* of a problem arising.

Failure to get evidence in because of the failure to pursue it timely is therefore more than a malpractice issue; by virtue of this rule, it is a matter of possible ethics complaint as well.

ON POSTPONEMENT REQUESTS: Such requests are to made within 7 days of the date of the notice of hearing. Later requests are entertained, but the lateness of the request gives the division one more reason to simply deny the request (which is supposed to be our current tack anyway, to try all we can). Procrastination in this can lead to one’s

client being put in an unnecessarily disadvantageous trial position, if they would have benefited in some way from the postponement.

Failure to timely marshal all the evidence necessary to try the matter also implicates the provision of SCR 20:1.1 that indicates that “Competent representation requires the . . .thoroughness and preparation reasonably necessary for the representation.”

III. REASONABLENESS OF FEES.

Boy, can this be a hornet’s nest.

Lawyers need to be appropriately paid; else, they can’t keep the doors open and provide for themselves and their families.

However, and especially with individual clients (workers), there is a need to keep the fees they must pay at a minimum, for their own good and provision as well.

This is a common source of tension between client and attorney. Both interests are legitimate.

The requirement of SCR 20:1.5 (a) is that the fee be “reasonable.” Wis. Stats. Sec. 102.26 (2) fixes the fees for the workers’ attorneys. Sub 1-8 of SCR 20:1.5 (1) are the criteria for determining the reasonableness of respondents’ attorneys’ fees.

20:1.5 (b) requires a communication of the fee agreement for workers’ attorneys and for respondents’ attorneys when the “lawyer has not regularly represented the client.”

It states that the communication should be “preferably in writing” and be communicated “before or within a reasonable time after commencing the representation.”

20:1.5 (c) requires that if the fee is contingent (and a 20% fee is contingent), that the agreement shall be in writing. It shall state the method of calculation of the fee, including the percentage of fee. It shall state whether the costs of litigation shall be deducted further from the recovery, and whether the percentage fee is calculated before or after deduction for expenses.

The biggest problem with fees from the standpoint of the workers' attorneys is the issue of fees on treatment expenses. Without a full reprise on the issue, trust that it is true that the division currently does what it can to deny fees on treatment expenses (in all but the rarest cases).

However, in the case of compromise agreements, this can get a little murky. A compromise agreement that pays a lump sum will likely result in a 20% fee on the whole amount. But what if the amount, unbeknownst to the ALJ, includes payment of amounts that the worker will need to use for outstanding treatment expenses?

I would suggest that failure to apprise of the worker of the ability to factor out of the lump sum the amount of the treatment expenses (lowering the attorney fee) may implicate the reasonableness of fee portion of SCR 20:1.5 (a) and the communication provision of SCR 20:1.4 (b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

The only reason I mention this is because a client called me in the midst of a settlement discussion to tell me that he was aware of such a rule in a case in which a claim was settled for a large, undifferentiated lump sum. I am certain most claimants don't however know of this issue: if they learn of it later, and the buyer's remorse sets in, it will increase the likelihood of dissatisfaction and complaint.

Hence, a full discussion of settlement options for workers should include a discussion of the separation out of unpaid treatment expenses from the lump sum, so the client can make an informed decision on that issue.

As to respondents, a big fee issue right now appears to be the degree to which bills submitted to third party audit services may violate the duty of confidentiality to employer clients. Generally, SCR 20:1.6 (a) provides that the lawyer “shall not reveal information relating to representation of a client unless the client consents after disclosure. . . .” There appears to be no exception to this rule as far as billing is concerned. Hence, it appears to be that great care must be taken to preserve all client’s confidences in bills submitted; there is no prohibition from submitting billing in these instances, merely from submitting billing with client confidences.

IV. THREATENING CRIMINAL PROSECUTION

Wis. Stats. Sec. 102.125 provides that the division must, under certain circumstances, report fraudulent claims (Wis. Stats. Sec. 943.395) to district attorneys for potential prosecution.

What the respondent may do with that in the course of a claim bears some care. In a number of cases, the respondent will have the information that may point to a fraudulent claim or other fraudulent activity by the worker, which the respondent may wish to use to quell or settle the claim.

SCR 20:3.10 provides that “A lawyer shall not present, participate in presenting or threaten to present criminal charges *solely* to obtain an advantage in a civil matter.”

The lawyer may, of course, present the information to the worker or lawyer for same in order to demonstrate the existence of evidence that would defeat the claim. To demonstrate knowledge of the existence of evidence of criminal behavior is not a violation of the rule.

To mention the possibility of criminal charges may be, and is when the *sole* purpose of the disclosure is to gain advantage in a non-criminal matter (I suggest worker's compensation claims would fall under the realm of "civil" matters.)

To induce settlement in a contended worker's compensation claim would be to obtain an advantage. In fact, threatening to present criminal charges to settle a case probably doesn't have another purpose.

So, one may present information consistent with the occurrence of a crime (fraud) to defend the claim, and one probably can't threaten prosecution "unless."

Can one mention criminality at all? The rule seems to suggest that the mere mention of the criminality of conduct doesn't necessarily violate the rule, BUT when does that mention become a threat (especially in light of the fact that the mention of the conduct will make the person legitimately feel threatened, which probably would be the intended effect of disclosing that legal opinion of the conduct)?

There probably isn't a safe harbor for the lawyer to mention criminality of conduct in such matters; perhaps the best bet is to save the comments on criminality or reporting to the DA or the like and hope a third party (ALJ, for example) carries the water on that subject.

To mention criminality or reporting to the DA or the like simply gives an angry, disappointed party something to complain about regarding you, which should be avoided.

V. UNREPRESENTED WORKERS AT PREHEARINGS

Occasionally respondent's counsel, in order to assist matters to resolve, will make certain comments to injured workers at prehearings to get them to take actions which are intended to increase the likelihood of settlement (such as submission of bills to third party carriers in order to reduce the unpaid amount of the bills at issue).

SCR 20:4.3 deals with this situation. The requirements of the rule include a provision that the lawyer "shall not state or imply that the lawyer is disinterested." Additionally, if the lawyer can tell that the person misunderstands the lawyer's role, "the lawyer shall make reasonable efforts to correct the misunderstanding."

The Comment is instructive in that it tends to put a damper on the usual practice of some counsel to suggest ways to the worker that might make the case more manageable (which, arguably, is legal advice). It states, "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."

It would be best if comments made by the lawyer at prehearing are not phrased in any fashion that would sound like advice, much less legal advice. Additionally, such comments as are made that might be construed as such should, at the very least (and, again, if they are made at all), be accompanied by an express disclaimer by the lawyer repeating that he represents a client other than the worker and that he does not intend to give advice to the worker.

Asking the Administrative Law Judge at a prehearing to discuss certain issues and make certain suggestions (in lieu of the lawyer expounding on the subject), would likely be even a safer tack than commenting at all.

Should a worker get a suggestion from the opposing attorney, follow it, and then have a bad result from following the suggestion (or, for that matter, the worker just simply get ticked off at the lawyer for an unrelated reason), not following this rule (even meaning well doing it) could result in complaint.

CONCLUSION:

This brief overview recounts a number of the issues broached at the longer seminars over the years. It is by no means comprehensive, and is (in fact, admittedly) summary. However, this should prove of use to the newer practitioner, as well as to the older practitioner as a refresher.

Ethics is not just staying out of trouble, or even doing right, all of which it is. It is also a way to best look out for the interests of the lawyer in litigation, especially when dealing with people who easily can get quite angry when their claims are processed in this system, and who (when all else fails) might come looking for you for vengeance. Being careful and ethical gives them nothing to hang their hat on.